does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by § 655.102(b) of this part. If any such modifications are required after an application has been accepted for consideration by the OFLC Administrator, the modifications must be made; however, the certification determination shall not be delayed beyond the 20 calendar days prior to the date of need as a result of such modification.

(d) *Final determination.* By 20 calendar days before the date of need specified in the application, except as provided for under §§ 655.101(c)(2) and 655.104(e) of this part for untimely modified applications, the OFLC Administrator, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.103 of this part. If the OFLC Administrator concludes that the employer has not satisfied the requirements for recruitment of U.S. workers, the OFLC Administrator shall deny the temporary alien agricultural labor certification, and shall immediately notify the employer in writing with a copy to the SWA. The notice shall contain the statements specified in § 655.104(d) of this part.

(e) *Appeal procedure.* With respect to determinations by the OFLC Administrator pursuant to this section, if the employer timely requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

[52 FR 20507, June 1, 1987, as amended at 71 FR 35519, June 21, 2006]

§ 655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.

(a) *Referral of able, willing, and qualified eligible U.S. workers.* With respect to the referral of U.S. workers to job openings listed on a job order accompanying an application for temporary alien agricultural labor certification, no U.S. worker-applicant shall be referred unless such U.S. worker has been made aware of the terms and conditions of and qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.

(b)(1) *Determinations.* If the OFLC Administrator, in accordance with § 655.105 of this part, has determined that the employer has complied with the recruitment assurances and the adverse effect criteria of § 655.102 of this part, by the date specified pursuant to § 655.101(c)(2) of this part for untimely modified applications or 20 calendar days before the date of need specified in the application, whichever is applicable, the OFLC Administrator shall grant the temporary alien agricultural labor certification request for enough H–2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the OFLC Administrator shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads. Such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the OFLC Administrator determines are likely to sign a work contract. The OFLC Administrator shall count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons or who has not been provided with a lawful job-related reason for rejection by the employer, as determined by the OFLC Administrator. The OFLC Administrator shall not grant a temporary alien agricultural labor certification request for any H–2A workers if the OFLC Administrator determines that:

(i) Enough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer's job opportunities;

(ii) The employer, since the time the application was accepted for consideration under § 655.104 of this part, has

adversely affected U.S. workers by offering to, or agreeing to provide to, H–2A workers better wages, working conditions or benefits (or by offering to, or agreeing to impose on alien workers less obligations and restrictions) than those offered to U.S. workers;

(iii) The employer during the previous two-year period employed H–2A workers and the OFLC Administrator has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of a temporary alien agricultural labor certification with respect to the employment of U.S. or H–2A workers;

(iv) The employer has not complied with the workers' compensation requirements at §655.102(b)(2) of this part; or

(v) The employer has not satisfactorily complied with the positive recruitment requirements specified by this subpart.

Further, the OFLC Administrator, in making the temporary alien agricultural labor certification determination, will subtract from any temporary alien agricultural labor certification the specific verified number of job opportunities involved which are vacant because of a strike or other labor dispute involving a work stoppage, or a lockout, in the occupation at the place of employment (and for which H–2A workers have been requested). Upon receipt by the OFLC Administrator of such labor dispute information from any source, the OFLC Administrator shall verify the existence of the strike, labor dispute, or lockout and any resulting vacancies prior to making such a determination.

(2) *Fees.* A temporary alien agricultural labor certification determination granting an application shall include a bill for the required fees. Each employer (except joint employer associations) of H–2A workers under the application for temporary alien agricultural labor certification shall pay in a timely manner a nonrefundable fee upon issuance of the temporary alien agricultural labor certification granting the application (in whole or in part), as follows:

(i) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee. The fees shall be paid by check or money order made payable to ''Department of Labor''. In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(ii) *Timeliness.* Fees received by the OFLC Administrator no more than 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

(c) *Changes to temporary alien agricultural labor certifications; temporary alien agricultural labor certifications involving employer associations*—(1) *Changes.* Temporary alien agricultural labor certifications are subject to the conditions and assurances made during the application process. Any changes in the level of benefits, wages, and working conditions an employer may wish to make at any time during the work contract period must be approved by the OFLC Administrator after written application by the employer, even if such changes have been agreed to by an employee. Temporary alien agricultural labor certifications shall be for the specific period of time specified in the employer's job offer, which shall be less than twelve months; shall be limited to the employer's specific job opportunities; and may not be transferred from

one employer to another, except as provided for by paragraph (c)(2) of this section.

(2) *Associations*—(i) *Applications.* If an association is requesting a temporary alien agricultural labor certification as a joint employer, the temporary alien agricultural labor certification granted under this section shall be made jointly to the association and to its employer members. Except as provided in paragraph (c)(2)(iii) of this section, such workers may be transferred among its producer members to perform work for which the temporary alien agricultural labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary alien agricultural labor certifications to associations may be used for the certified job opportunities of any of its members. If an association is requesting a temporary alien agricultural labor certification as a sole employer, the temporary alien agricultural labor certification granted pursuant to this section shall be made to the association only.

(ii) *Referrals and transfers.* For the purposes of complying with the ''fifty-percent rule'' at § 655.103(e) of this part, any association shall be allowed to refer or transfer workers among its members (except as provided in paragraph (c)(2)(iii) of this section), and an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(iii) *Ineligible employer-members.* Workers shall not be transferred or referred to an association's member, if that member is ineligible to obtain any or any additional workers, pursuant to § 655.110 of this part.

(3) *Extension of temporary alien agricultural labor certification*—(i) *Short-term extension.* An employer who seeks an extension of two weeks or less of the temporary alien agricultural labor certification shall apply for such extension to DHS. If DHS grants such an extension, the temporary alien agricultural labor certification shall be deemed extended for such period as is approved by DHS. No extension granted under this paragraph (c)(3)(i) shall be for a period longer than the original work contract period of the temporary alien agricultural labor certification.

(ii) *Long-term extension.* For extensions beyond the period which may be granted by DHS pursuant to paragraph (c)(3)(i) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the OFLC Administrator for an extension of the period of the temporary alien agricultural labor certification, for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and could not have been reasonably foreseen by the employer. The OFLC Administrator shall grant or deny the request for extension of the temporary alien agricultural labor certification based on available information, and shall notify the employer of the decision on the request in writing. The OFLC Administrator shall not grant an extension where the total work contract period, including past temporary alien labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The OFLC Administrator shall not grant an extension where the temporary alien agricultural labor certification has already been extended by DHS pursuant to paragraph (c)(3)(i) of this section.

(d) *Denials of applications.* If the OFLC Administrator does not grant the temporary alien agricultural labor certification (in whole or in part) the OFLC Administrator shall notify the employer by means reasonably calculated to assure next-day delivery. The notification shall contain all the statements required in § 655.104(c) of this part. If a timely request is made for an administrative-judicial review or a *de novo* hearing by an administrative law judge, the procedures of § 655.112 of this part shall be followed.

(e) *Approvals of applications*—(1) *Continued recruitment of U.S. workers.* After a temporary agricultural labor certification has been granted, the employer shall continue its efforts to recruit U.S. workers until the actual date the

H–2A workers depart for the employer's place of employment.

(i) Unless the SWA is informed in writing of a different date, the SWA shall deem the third day immediately preceding the employer's first date of need to be the date the H–2A workers depart for the employer's place of employment. The employer may notify the SWA in writing if the workers depart prior to that date.

(ii)(A) If the H–2A workers do not depart for the place of employment on or before the first date of need (or by the stated date of departure, if the SWA has been advised of a different date), the employer shall notify the SWA in writing (or orally, confirmed in writing) as soon as the employer knows that the workers will not depart by the first date of need, and in no event later than such date of need. At the same time, the employer shall notify the SWA of the workers' expected departure date, if known. No further notice is necessary if the workers depart by the stated date of departure.

(B) If the employer did not notify the SWA of the expected departure date pursuant to paragraph (e)(1)(ii)(A) of this section, or if the H–2A workers do not leave for the place of employment on or before the stated date of departure, the employer shall notify the SWA in writing (or orally, confirmed in writing) as soon as the employer becomes aware of the expected departure date, or that the workers did not depart by the stated date and the new expected departure date, as appropriate.

(2) *Requirement for Active Job Order.* The employer shall keep an active job order on file until the ''50-percent rule'' assurance at §655.103(e) of this part is met, except as provided by paragraph (f) of this section.

(3) *Referrals by ES System.* The ES system shall continue to refer to the employer U.S. workers who apply as long as there is an active job order on file.

(f) *Exceptions*—(1) *''Fifty-percent rule'' inapplicable to small employers.* The assurance requirement at §655.103(e) of this part does not apply to any employer who:

(i) Did not, during any calendar quarter during the preceding calendar year, use more than 500 ''man-days'' of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the OFLC Administrator in the H–2A application; and

(ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this subpart for its members; and

(iii) Has not otherwise ''associated'' with other employers who are applying for H–2A workers under this subpart, and so certifies to the OFLC Administrator.

(2) *Displaced H–2A workers.* An employer shall not be liable for payment under §655.102(b)(6) of this part with respect to an H–2A worker whom the OFLC Administrator certifies is displaced due to compliance with §655.103(e) of this part.

(g) *Withholding of U.S. workers prohibited*—(1) *Complaints.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H–2A workers in order to force the hiring of U.S. workers under §655.103(e) of this part may submit a written complaint to the SWA. The complaint shall clearly identify the person or entity whom the employer believes has withheld the U.S. workers, and shall specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the SWA.

(2) *Investigations.* The SWA shall inform the OFLC Administrator by telephone that a complaint under the provisions of paragraph (g) of this section has been filed and shall immediately investigate the complaint. Such investigation shall include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld. In the event the SWA fails to conduct such interviews, the OFLC Administrator shall do so.

(3) *Reports of findings.* Within five working days after receipt of the complaint, the SWA shall prepare a report of its findings, and shall submit such report (including recommendations)

and the original copy of the employer's complaint to the OFLC Administrator.

(4) *Written findings.* The OFLC Administrator shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the OFLC Administrator deems appropriate. No later than 36 working hours after receipt of the employer's complaint and the local office's report, the OFLC Administrator shall issue written findings to the local office and the employer. Where the OFLC Administrator determines that the employer's complaint is valid and justified, the OFLC Administrator shall immediately suspend the application of § 655.103(e) of this part to the employer. Such suspension of § 655.103(e) of this part under these circumstances shall not take place, however, until the interviews required by paragraph (g)(2) of this section have been conducted. The OFLC Administrator's determination under the provisions of this paragraph (g)(4) shall be the final decision of the Secretary, and no further review by any DOL official shall be given to it.

(h) *Requests for new temporary alien agricultural labor certification determinations based on nonavailability of able, willing, and qualified U.S. workers*—(1) *Standards for requests.* If a temporary alien agricultural labor certification application has been denied (in whole or in part) based on the OFLC Administrator's determination of the availability of able, willing, and qualified U.S. workers, and, on or after 20 calendar days before the date of need specified in the temporary alien agricultural labor certification determination, such U.S. workers identified as being able, willing, qualified, and available are, in fact, not able, willing, qualified, or available at the time and place needed, the employer may request a new temporary alien agricultural labor certification determination from the OFLC Administrator. The OFLC Administrator shall expeditiously, but in no case later than 72 hours after the time a request is received, make a determination on the request.

(2) *Filing requests.* The employer's request for a new determination shall be made directly to the OFLC Administrator. The request may be made to the OFLC Administrator by telephone, but shall be confirmed by the employer in writing as required by paragraphs (h)(2)(i) or (ii) of this section.

(i) *Workers not able, willing, qualified, or eligible.* If the employer asserts that any worker who has been referred by the ES System or by any other person or entity is not an eligible worker or is not able, willing, or qualified for the job opportunity for which the employer has requested H–2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified, or eligible because of lawful job-related reasons. The employer's burden of proof shall be met by the employer's submission to the OFLC Administrator, within 72 hours of the OFLC Administrator's receipt of the request for a new determination, of a signed statement of the employer's assertions, which shall identify each rejected worker by name and shall state each lawful job-related reason for rejecting that worker.

(ii) *U.S. workers not available.* If the employer telephonically requests the new determination, asserting solely that U.S. workers are not available, the employer shall submit to the OFLC Administrator a signed statement confirming such assertion. If such signed statement is not received by the OFLC Administrator within 72 hours of the OFLC Administrator's receipt of the telephonic request for a new determination, the OFLC Administrator may make the determination based solely on the information provided telephonically and the information (if any) from the SWA.

(3) *National Processing Center review*—(i) *Expeditious review.* The OFLC Administrator expeditiously shall review the request for a new determination. The OFLC Administrator may request a signed statement from the SWA in support of the employer's assertion of U.S. worker nonavailability or referred U.S. workers not being able, willing, or qualified because of lawful job-related reasons.

(ii) *New determination.* If the OFLC Administrator determines that the employer's assertion of nonavailability is accurate and that no able, willing, or

qualified U.S. worker has been refused or is being refused employment for other than lawful job-related reasons, the OFLC Administrator shall, within 72 hours after receipt of the employer's request, render a new determination. Prior to making a new determination, the OFLC Administrator promptly shall ascertain (which may be through the ES System or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received.

(iii) *Notification of new determination.* If the OFLC Administrator cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the OFLC Administrator shall grant the employer's new determination request (in whole or in part) based on available information as to replacement U.S. worker availability. The OFLC Administrator's notification to the employer on the new determination shall be in writing (by means normally assuring next-day delivery), and the OFLC Administrator's determination under the provisions of this paragraph (h)(3) shall be the final decision of the Secretary, and no further review shall be given to an employer's request for a new H–2A determination by any DOL official. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

[52 FR 20507, June 1, 1987, as amended at 55 FR 29358, July 19, 1990; 64 FR 34966, June 29, 1999; 71 FR 35519, 35521, June 21, 2006]

§ 655.107 Adverse effect wage rates (AEWRs).

(a) *Computation and publication of AEWRs.* Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of § 655.93 of this part) for which temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The OFLC Administrator shall publish, at least once in each calendar year, on a date or dates to be determined by the OFLC Administrator, AEWRs for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the FEDERAL REGISTER.

(b) *Higher prevailing wage rates.* If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the OFLC Administrator) is found to be higher that the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

(c) *Federal minimum wage rate.* In no event shall an AEWR computed pursuant to this section be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

[52 FR 20507, June 1, 1987, as amended at 54 FR 28046, July 5, 1989]

§ 655.108 H–2A applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving a temporary alien agricultural labor certification application is discovered prior to a final temporary alien agricultural labor certification determination or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the OFLC Administrator shall refer the matter to the DHS and DOL Office of the Inspector General for investigation. The OFLC Administrator shall continue to process the application and may issue a temporary alien agricultural labor certification.